IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 443 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DILVARKHAN HAMIDKHAN PATHAN - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR AD SHAH for Appellant(s) : 1,
Mr.R.C.Kodekar, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH

Date : 20/12/2005

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE MD SHAH)

1. In this appeal filed under Section 374 of the Criminal Procedure Code, the appellant-Dilavarkhan Hamidkhan Pathan

has challenged his conviction under Section 302 of the Indian Penal Code ("IPC" for short) as well as the sentence of R.I. for life and fine of Rs.1000/-, in default, further three months R.I. recorded by the learnedAdditional Sessions Judge, Rajkot, in Sessions Case no.134 of 1995 vide judgment and order dated 21-3-1997.

2. The relevant facts leading to the filing of the present appeal are that the incident in question is alleged to have taken place on 29th April, 1995 at the newly rented residential house of the accused at Jangaleshwar Sheri no.27 at Rajkot. The deceased Hasina daughter of the complainant had married with the appellant-accused who was residing at Hapa Village six years prior to the date of incident. Thereafter, both the appellant-accused and the deceased lived there happily with her husband-the accused and her in-laws for about one and a half years but later on the accused started consuming liquor and the deceased

Hasina was subjected to physical torture and mental cruelty by beating her for no reason. It was further the case of the prosecution that since the deceased Hasina became pregnant she was taken to her parental home i.e. the house of the complainant and she gave birth to a baby boy. Even thereafter, the appellant-accused continued to beat the deceased and ill-treat her. In fact, the deceased was completely fed up while residing at the place of her in-laws itself. Deceased Hasina used to disclose such incidents of beating whenever she used to visit the house of her father-the complainant as a result of which the complainant did not send the deceased back to her matrimonial home. Even then, after the birth of the son, the sister and sister's husband and other relatives of the accused came to the house of the complainant and after arriving at a settlement deceased Hasina was taken to the place of her in-laws, where again she was meted out with ill-treatment of the same nature. However, she stayed there for about eight months. Thereafter, as there was a marriage in the

family at Rajkot, deceased Hasina, as also the accused and other family members of the accused came to Rajkot where the complainant who was also invited was also present. There the deceased Hasina on meeting her father-the complainant told him that her husband the accused is still treating her with mental and physical torture by beating her for no reason. Thereupon, the complainant after discussing this fact with the accused and his brother, under intimation to them, took the deceased Hasina to his house, and since then, the deceased Hasina and her son stayed there at her parental home for four years.. Thereafter, before about one and half months to the date of incident a notice came to be issued to the accused and after 15 days thereof, the accused came to the house of the complainant, admitted his mistake, and tendered apology. So a compromise was entered into between the parties and a Court settlement took place. The accused and the deceased Hasina with their five year old son Akram, then started residing separately in a newly rented house

at Jangleshwar Sheri no.27, Rajkot, owned by one Hemiben Vaghri. From there, the accused used to attend his factory and they stayed there till a week prior to the date of the incident.

3. It was further the case of the prosecution that at about 6.00 p.m. on the date of incident, the deceased Hasina along with her son Akram visited the house of the complainant and told the complainant that the accused was at home (newly rented house at Jangaleshwar Sheri no.27, Rajkot) and that he has to attend night shift duty at the factory. She also added that she had come after preparing khichadi. So saying she left her son Akram at the house of the complainant-her father and returned back to their said residence at Rajkot by informing the complainant that she would be back after having dinner in the accompany of her husband-the accused and from there her husband the accused would go for work. Thereafter, the complainant came on a stroll at the house of deceased Hasina

and, at that time, found that the main door of her house was closed from outside by applying a chain. On opening the door and finding a closed curtain, he gave a call and since no one responded, he went inside the room and found that Hasina was lying straight on her back on the ground with her face upwards. At that time, the accused was not present in the house. He then noticed that blood and froth had come out of deceased Hasina's mouth and that thick electric wire was encircled round her neck and she was strangulated to death. Thereupon, the complainant came out of the house of deceased Hasina crying loudly. He then went to his house and informed the family members and other relatives about the incident. His relative Yunusbhai then informed the Police by making a telephone call from the house of Ganuben residing in his street. Thus, the case of the prosecution is to the effect that even after the compromise the accused had been continuously illtreating the deceased Hasina as he did not want to keep her with him, and therefore, with a

view to get rid of her, the accused had encircled electric wire round her neck, strangulated her to death and fled away. Thereafter, a complaint was lodged by the complainant at Rajkot City "B" Division Police Station. PSI Avadhh Vasi who was then discharging his duties at the said Police Station recorded the complaint and registered the offence. The investigation was handed over to P.I Chudasma who after carrying out the necessary formalities, on completion of the investigation submitted charegesheet in the Court of Chief Judicial Magistrate (F.C.), Rajkot, and on receiving information the accused was arrested on 30th April,1995 from Jamnagar and the case was committed to the Sessions Court at Rajkot. The learned Sessions Judge had framed charge against the appellant-accused for offence punishable under Section302 of the Indian Penal Code. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution therefore, examined : (i) PW 1 Alibhai Husenbhai

Kureshi at Exh.7, (ii) PW 2 Dr. Navalbhai Devshankerbhai at Exh.8, (iii) PW 3 Abdul HameedGafarbhai at Exh.14, (iv) PW 4 Razakbhai Allarakhbhai at Exh.15, (v) PW 5 Dhirubhai Jivabhai at Exh.17, (vi) PW 6 Hasinaben Mamadbhai at Exh.18, (vii) PW 7 Yunusbhai Basheerbhai at Exh.20, (viii) PW 8 Hemiben Kachrabhai at Exh.21 (ix) PW9 Jubedaaben Hasambhai at Exh.22, (x) PW 10 Abdul Habibbhai at Exh.23, (xi) PW 11 Ganuben Prabhatbhai at Exh.24, (xii) PW 12 Head Constable Ramvilas Shivpujansingh at Exh.25, (xiii) PW 13 Head Constable Manharlal Meghjibhai at Exh.19, (xiv) PW 14 P.I. Narendrasinh KiritsinhChudasma at Exh.31, (xv) PW 15 Dhirubhai Manubhai at Exh.35, (xvi) PW 16 Ramabhai Badriprasad Gupta at Exh.36, (xvii) PW 17 Head Constable Kedarnath Ramlal Avadhvasi Exh.38, (xviii) PW 18 Dilip Bachubhai at Exh.42 , and also produced documentary evidence such asF.I.R. filed by the complainant-Alibhai Husenbhai Kureshi-the father of the deceased at Exh.40, Panchnama of

clothes worn by the deceased at Exh.32, Post Mortem Reports, Inquest Report at Exh.19, compromise entered into between the accused and the deceased at Exh.13, yadies sent to PSI and PI etc. to prove its case against the appellant. After recording of evidence of prosecution witnesses was over, the learned Judge recorded the statement of the appellant under Section 313 of the Code of Criminal Procedure. In his further statement, the appellant's case was of total denial, but did not examine any witness in support of his defence.

4. On appreciation of the evidence adduced by the prosecution the learned Judge deduced that evidence of complainant-Alibhai Husenbhai Kureshi was reliable as well as trustworthy and was corroborated by contemporary document, namely, complaint lodged by him. The learned Judge has arrived at a finding that the statement made by the complainant about the presence of the accused at the newly rented premises at

Jangaleshwar Sheri no.27 at the time when the deceased Hassina left that house and went to the complainant's house with her son Vikram and that she had to return back as the accused had to attend night shift duty was revealed to him by his daughter the deceased Hasina. The deceased Hasina had also told him that she would return back in the company of her husband and from there her husband would go for night shift duty, and therefore, it could be safely presumed that accused was present at the said house when deceased Hasina returned back from the house of the complainant, and at that time, the accused had strangulated her to death. The learned Judge had also relied upon the evidence of Dr.Navalbhai Devshankarbhai for holding that the deceased had died a homicidal death due to strangulation and for that matter, the learned Judge has also referred to and relied upon the evidence of Police Officers as well as the Post Mortem Report. In view of the above referred to conclusions, the learned Judge has passed the judgment and order of conviction and

sentence dated 21-3-1997 as stated in paragraph 1 of this judgment, giving rise to the present appeal.

5. Mr.A.D.Shah, learned Counsel for the appellant after taking us through the entire evidence on record submitted that story of the prosecution that the accused wanted to get rid of the deceased Hasina cannot be believed since there was a settlement of compromise and no untoward incident was reported, and thereafter the couple alongwith with their son was residing separately in their newly rented premises at Jangaleshwar Sheri no.27. It is submitted by Mr.Shah that even on the day of incident the deceased Hasina had gone to the house of her parents alongwith son Akram and assured to come back in company of her husband and that her husband would go for night shift duty from her parental house. According to the submission of Mr. Shah motive for the accused to commit the crime in question as suggested by the prosecution cannot be

established. Mr.Shah next submitted that there is no material on record to show the presence of the appellant-accused at the residence on or about the time of incident on 29th April, 1995 or that the accused had left the place soon before the arrival of the complainant to the house where the accused and deceased Hasina were staying separately. Mr.Shah next submitted that the opinion given by PW 2 Dr.Navalbhai Devashanker at Exh.28 that the cause of death is strangulation with the aid of an electric wire whereas the symptoms found by him on the dead body of the deceased with regard to froth with blood coming out from the mouth and tongue being crushed between teeth as well as passing of urine can also be as a result of suicide. Mr. Shah then drew our attention to the corrections in the Post Mortem Report Exh.12 wherein column no.5 which read " Hanged by neck was corrected to read as " Strangulation by neck" by striking down the word "Hanged". Similary, he pointed out the correction at column no.17 wherein, according to him, there is a correction in

description of injuries "Linear contusion goes" and (the word "goes" is corrected to read as "passes") posteriorily, horizontally fades away back of neck" According to him, actually, "Horizontally fades away" is written above " at same level no mark on" which has been struck down. Similarly, in column no.23 regarding cause of death, the words "neck obstruction" have been struck down from the statement "asphyxia due to neck obstruction at neck" and strangulation is substituted. Mr.Shah, therefore, submitted that the PostMortem note is required to be taken out of consideration. Mr.Shah next submitted that there were no injuries on any part of the body of the deceased which is indicative of the fact that there has been no struglgle between the appellant-accused and the deceased and in absence of struggle or resistance from the deceased, according to Mr. Shah the act of strangulation was not possible. Mr.Shah also submitted that there were three rounds of electric wire taken around the neck of deceased Hasina and this fact probabilizes the theory of suicide

rather than homicide. Mr.Shah next submitted that the conduct of the deceased visiting her parental house with son Vikram and returning back home, leaving her son Vikram there, by telling the complainant and other family members that she would return in the company of her husband after having dinner as her husband has to go for night shift duty and that her husband would go for duty from there, would go to show that the deceased had some plans of committing suicide and must have conveyed accordingly to her father. In view of this, according to Mr.Shah, the prosecution evidence to the effect that the complainant had come to the house of the appellant-accused within half an hour of the deceased Hasina leaving the house of the complainant without there being any complaint by the deceased against the accused is quite unnatural. Mr.Shah also submitted that the complainant ought to have inquired from the neighbours to find out as to the circumstances that prevailed after deceased Hasina left son Vikram at his house and went

back to the residential house of the appellant-accused and the deceased. Mr. Shah finally submitted that thus considering the circumstantial evidence, there is no evidence to connect the appellant-accused with the crime in question, and therefore the appeal is required to be allowed and the appellant would be entitled to acquittal.

6. Mr.R.C.Kodekar, learnedA.P.P. submitted that the complainant-Alibhai Husenbhai Kureshi had no earthly reason to involve the appellant falsely in serious case of murder of his wife-deceased Hasina and as he has narrated the incident in a straightforward manner, his evidence is rightly acted upon by the learned Judge for the purpose of convicting the appellant under Section 302 of the Indian Penal Code. The learned A.P.P. referred to the documentary evidence such as F.I.R. filed by the complainant, Post Mortem Reports, papers of investigation and evidence of Police Officers and submitted that these documents

completely corroborates the testimony of the complainant-Alibhai Husenbhai Kureshi and offers guarantee to the truthfulness and trustworthiness of his testimony. The learned A.P.P. pleaded that the testimony of complainant stands corroborated in material particulars by his complaint , and therefore, no error can be said to have been committed by the learned Judge in placing reliance on the testimony of the complainant and basing conviction against the appellant-accused. To conclude with his submission, the learned A.P.P. submitted that the view taken by the learned Judge on appreciation of the evidence, be it circumstantial in nature, to the effect that the appellant had committed murder of the deceased being just and proper should not be disturbed in the present appeal. According to the learned A.P.P., the conviction of the appellant-accused under Section 302 of the Indian Penal Code is perfectly justified and does not call for interference in the hands of this Honourable Court.

7. We have minutely scrutinized the prosecution evidence as well as the defence evidence and on such close scrutiny we find no substance in the submissions canvassed by Mr. Shah learned Counsel for the appellant. In the present case, admittedly there are no eye witnesses to the incident and the conviction of the appellant solely rests on the circumstantial evidence which consists of motive, medical evidence and conduct of the accused. At the outset, we may mention here that the standard of proof required to convict a person on circumstantial evidence is now well settled. According to the standard enunciated by the Supreme Court, the circumstances relied upon by the prosecution in support of the case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the

conclusion of the guilt of an accused is to be inferred, should be of conclusive nature and consistent only with the hypothesis of guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all circumstances cumulatively taken together lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime. In the present case, the learned Sessions Judge founded the conviction of the appellant on the basis of the circumstantial evidence consisting of the motive, medical evidence and the conduct of the accused which are said to be established against the appellant. So far as motive is concerned, the contention of Mr. Shah that the accused had no reason to commit the murder of his own wife cannot be accepted even for a moment since according to the prosecution case every time the deceased Hasina went to stay with the appellant-accused, the accused used to consume liquor and subject her to mental torture and physical cruelty by beating her which fact is

borne out and gets corroboration from the evidence of the complainant-the father of the deceased(Exh.7) as also the evidence of Jubedaben-the mother of the deceased (Exh.22). Jubedan has specifically stated in her evidence that her daughter the deceased Hasina had told her that if she wanted her alive, she be kept at the parental house and not be sent to the matrimonial home as the appellant-accused has been subjecting her to mental torture and physical cruelty very often. The notice Exh.37 dated 15th March, 1995 issued to the appellant-accused by the deceased and the compromise Exh.13 dated 30th March, 1995 are the other documents which lend support to the prosecution. In the document of compromise, the deceased had confessed that he had been illtreating the deceased Hasina by beating her up and subjecting her to mental torture and physical cruelty owing to which the deceased Hasina had to live with her parent for four years. This shows that even though there was settlement or compromise on several occasions, there prevailed strained

relations between the accused and the deceased Hasina and therefore, with a view to get rid of his wife the deceased Hasina, the appellant accused had strangulated her to death. The learned Judge was, therefore, right in believing the evidence of the complainant-the father of the deceased as also the evidence of the mother of the deceased. Thus, taking into consideration the compromise and the notice referred to above the learned Judge passed the judgment and order of conviction and sentence by placing reliance on the same.

8. The next circumstance which falls for consideration is on the aspect of medical evidence. PW 2 Dr.Navalbhai Devashanker in his testimony at Exh.24 has clearly opined that the cause of death was asphyxia due to strangulation by neck and that this was possible by the Muddamal electric wire which was found encircled on the neck of the dead body of the accused. The Post Mortem report also reveals hyoid cartilage

(bone) fracture which though not common in case of strangulation but rare. It was argued by Mr. Shah that there were corrections in the Post Mortem Note which according to him creates a doubt with regard to the genuiness of the Post Mortem Report. We have carefully perused the Post Mortem Note, however we are of the view that those corrections would not affect the case of the appellant-accused as they are trifle in nature and are bound to occur. That apart the genuineness of the Post Mortem Report is not challenged in cross-examination by the defence. Mr. Shah, learned Counsel for the appellant-accused has come forward with the case that there was no resistance on the part of the deceased Hasina and in absence such resistance, it cannot be said that death was caused on account of strangulation by neck. Mr. Shah also submitted that the household articles at the scene of offence(in the instant case the residential house of the deceased Hasina) would also be scattered in a case of strangulation and that it was not found so.

On this aspect, the learned Judge has relied on the evidence of Jubedaben the mother of the deceased wherein it was categorically stated by her that the household articles were found scattered which goes to show that there was resistance on the part of the deceased Hasina. That apart if a ligature (in the present case electric wire) is pulled against the front and sides of the neck of a person while standing at the back can cause death owing to asphyxia due to strangulation as the sudden compression of the windpipe often makes a person powerless and causes almost immediate unconsciousness and results into death in which case there can be no resistance offered from the victim. Thus, if the person is taken unawares and the ligature is suddenly placed around the neck and pulled tightly the person loses consciousness quickly and is unable to offer resistance. (See : The Essentials of Forensic Medicine and Toxicology , Pages 283 to 292). Moreover, in the present case, it may be noted that Jubedaben, the mother of the deceased in her

testimony has stated that she had seen the dead body of the deceased Hasina very closely and she observed that there were two or three knots of electric wire at the back of neck and that there were two rounds of wire in which case also strangulation can be safely presumed. We therefore do not agree with the submission of Mr. Shah that the medical evidence is not sufficient, unreliable and misleading to base conviction under Section 302 of the Indian Penal Code. The next circumstance is with regard to the conduct of the accused. The accused had pleaded a case of alibi but he has not tendered any proof thereof and the only explanation was that at the time of the incident he had gone to Hapa village to purchase some utensils, and therefore, the case of alibi stands raised to the ground. Jubedaben the mother of the deceased in her evidence has also stated that they had provided some utensils to the deceased Hasina when she went to live separately with the accused. The accused has also not examined any witness to prove his case.

The accused in his statement recorded under Section 313 of the Criminal Procedure Code has merely pleaded a case of alibi but did not make a statement that he went to Hapa Village, however, the factum of compromise having taken place and that he had treated the deceased Hasina with physical cruelty and mental torture is admitted by the accused therein. Lastly, it is interesting to note that there is also no evidence worth the name to show that the accused was in fact not present at the newly rented residential house of the accused and the deceased Hasina at the time of accident, however, there is a statement made by deceased Hasina to the complainant-the father of the deceased when she last went to her parental house that the deceased was present at said newly rented house and that he has to attend night duty shift at the factory and so saying she left her parental house and came back to the house where the accused and the deceased where staying separately. Not only that the witness Hemiben PW 8, though turned hostile, in her evidence at Exh.21

has stated that the deceased Hasina and the appellant was living separately in the newly rented house at Jangaleshwar Sheri no.27 which was of her ownership. This fact undoubtedly points an accusing finger to the appellant-accused and that in all probability the accused had caused the death of the deceased by strangulating her to death by using electric wire.

9. Having critically examined the evidence from all angles, be it circumstantial evidence, we are of the view that the trial Court has carefully and correctly analysed the evidence and had given cogent and convincing reasons to establish the guilt of the accused and we find no ground much less reasonable ground to doubt the prosecution case and that the learned Counsel for the appellant has failed to persuade us to differ from the conclusions reached by the learned trial Judge. Thus, in our considered opinion, the circumstantial evidence discussed above conclusively and unerringly leads to the only irresistible

conclusion that the appellant-accused was the perpetrator of the crime and none else. The following are the circumstances, in our opinion, which can be accepted, leading to proof of the appellant-accused in the present case:

(i) When the police reached the place of incident the appellant-accused was found absconding .

(ii) Deceased Hasina was ill-treated by the appellant- accused continuously whenever she used to reside at the matrimonial home which fact has been proved.

(iii) There is nothing on record to show that the appellant-accused and the deceased bore enmity with any outsider or that any outsider had forcibly entered the house of the deceased Hasina and caused her murder.

(iv) The appellant-accused could not bring anything on record to show that he was not present at the place

of incident whereas there is a specific statement by the deceased to her father when she last went to her father's house on the day of incident that the accused was at the newly rented house and so saying she left her father's house leaving her son Akram there and returend back to the newly rented house where the accused and deceased were staying.

(v) The deceased Hasina died at the newly rented house where appellant-accused and the deceased Hasina lived separately with their son.

In support of my conclusions reference may be had to the decision rendered in the case of (2004) 10 SCC 786 wherein at para 14 of the judgment, the Honourable Supreme Court has observed as under:

> “It may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct ocular evidence by examining

> before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue which taken together form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed."

Reference may also be beneficially made to the decision rendered in the case of Sardar Khan vs. State of Karnatakka reported in AIR 2004 SC 1695.

10. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had committed the murder of his wife-deceased Hasina since all the circumstances in our opinion point towards the guilt of the appellant-accused and there is no merit in the appeal. The appeal is therefore liable to be dismissed.

11. For the foregoing reasons, the appeal fails and is hereby dismissed. Muddammal articles to be disposed of in terms of the directions given in the impugned judgment.

(R.P.Dholakia,J.) (M.D.Shah,J.)

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